

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2005-KA-01058-COA**

**MICHAEL MEAN SMITH**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

DATE OF JUDGMENT:	5/12/2005
TRIAL JUDGE:	HON. MARCUS D. GORDON
COURT FROM WHICH APPEALED:	LEAKE COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	EDMUND J. PHILLIPS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: W. GLENN WATTS
DISTRICT ATTORNEY:	MARK SHELDON DUNCAN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	DUI, THIRD OR SUBSEQUENT OFFENSE: SENTENCED TO SERVE A TERM OF FOUR YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND A FINE OF \$2,000.
DISPOSITION:	REVERSED AND REMANDED: 02/27/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE KING, C.J., IRVING AND GRIFFIS, JJ.**

**GRIFFIS, J., FOR THE COURT:**

¶1. Michael Mean Smith was found guilty of felony driving under the influence (“DUI”), third offense. Smith appeals. He argues that the evidence was insufficient to find him guilty of DUI third offense and that he was denied a fair trial when the State introduced evidence of prior DUI convictions during the guilt phase of the trial. We reverse and remand for re-sentencing.

FACTS

¶2. On November 27, 2004, Smith was traveling on Highway 43 in Leake County, Mississippi. Deputy Sheriffs James D. Moore and Greg Mullin, while on patrol together, passed Smith's vehicle and noticed the vehicle was without a light to illuminate the license plate. The deputies pursued Smith. While in pursuit, they observed the vehicle swerve several times. After the vehicle stopped, Deputy Moore testified that Smith appeared intoxicated and smelled of alcohol. The deputies then took Smith to the Leake County Jail and administered a breath test, resulting in a blood alcohol content reading of .148 percent.

¶3. At trial, Deputy Moore and Deputy Mullin testified. At the conclusion of its case-in-chief, the State offered into evidence certified copies of court records concerning two prior DUI convictions. One document was an abstract of a court record that detailed Smith's guilty conviction for DUI first offense on March 10, 2000. The abstract indicated that the offense occurred on February 2, 2000. The second document was a certified copy of a judgment finding Smith guilty for DUI third or subsequent offense on September 3, 2002. However, the judgment did not identify the date when the offense was committed.

¶4. At the conclusion of the State's case-in-chief, Smith's counsel made a motion for a directed verdict and alleged that the State failed to meet its burden of proof. This motion was overruled. Thereafter, the jury returned a guilty verdict. Smith was sentenced to serve a term of four years in the custody of the Mississippi Department of Corrections and pay a \$2,000 fine and all costs of court. Smith filed a motion for a new trial and alleged, among other things, that the sentence given was not supported by the evidence. The motion was denied.

## ANALYSIS

*I. The evidence was insufficient to find Smith guilty of the crime of DUI third offense.*

¶5. Smith argues that the State presented insufficient evidence to prove that this was the third time Smith had been convicted of a DUI within five years. Smith claims that there was no evidence presented to the jury that the prior offenses occurred within five years of the most recent offense. The State argues this issue is barred for failure to raise the issue below.

¶6. We find that Smith did raise the argument below in his motion for a new trial. Specifically, Smith claimed that “the sentence given the Defendant by the Court in this case was not supported by the evidence.” Therefore, the State’s argument that this issue is barred for failure to raise it before the trial court is without merit. We now address the sufficiency of the evidence.

¶7. In reviewing a challenge of legal sufficiency, this Court must determine whether any rational juror could have found that the State proved each and every element of the crime charged beyond a reasonable doubt. *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The State must be given the benefit of all reasonable inferences that may be drawn from the evidence. *Christian v. State*, 859 So. 2d 1068, 1071 (¶12) (Miss. Ct. App. 2003) (citing *Wetz v. State*, 503 So. 2d 803, 808 (Miss. 1987)).

¶8. Smith was convicted in accordance with Mississippi Code Annotated Section 63-11-30(2)(c) (Supp. 2004). This section states in pertinent part that “[e]xcept as otherwise provided in subsection (3), for any third or subsequent conviction of any person violating subsection (1) of this section, *the offenses being committed within a period of five (5) years*, such person shall be guilty of a felony.” § 63-11-30(2)(c) (emphasis added). This requires that the State prove two things for each conviction. First, the offense resulted in a conviction for DUI; and second, the offense for which the defendant was convicted occurred within five years of the charged offense. Evidence of both the date the offense was committed, normally the date of the *arrest*, and that the arrest/offense resulted in a *conviction* are necessary to sustain a conviction under Section 63-11-30(2)(c).

¶9. Evidence was introduced of two previous convictions that Smith received for DUI's. The State introduced an abstract of a conviction on March 10, 2000, for an offense which occurred on February 2, 2000. Since the offense which Smith is currently appealing occurred on November 27, 2004, the February 2, 2000 offense clearly occurred within five years of the charge that he was on trial for as required by the statute.

¶10. Smith claims that error was with the second conviction that the State entered into evidence. For the second DUI conviction, the State entered into evidence a judgment dated September 3, 2002, convicting Smith of a DUI. Smith is correct that the judgment does not contain the date of when the offense occurred. Thus, the State failed to introduce evidence that the conviction under this judgment occurred within five years of the offense for which Smith was on trial. The State offered no further evidence of the date on which the second DUI offense occurred. The statute requires that the offenses must have been committed within a period of five years of each other, not the convictions. Proof of the convictions is required by the statute, but without including the date of the offense on the second DUI conviction there is no evidence to show that it occurred within five years of the most recent offense.

¶11. The dissent correctly notes that our courts have never addressed this issue. Yet, the dissent relies upon the "vast amount of precedent" to reach its interpretation that only evidence of prior convictions are necessary. We conclude that the dissent's interpretation would require us to ignore the phrase in Section 63-11-30(2)(c) that states "the offenses being committed within a period of five (5) years." We find this conclusion to be contrary to the specific language of the statute, and we must give effect to this language. We interpret this to requires that the State prove that the first and second offenses were "committed" within five years of the third offense. The only way to establish this fact is for the State to introduce evidence of the date the first and second offenses were

committed. Only then can we determine whether the “third offense” was committed within five years of the first and second. Evidence of only the conviction, which does not also contain the date the offense was committed, is not sufficient.

¶12. The dissent cites several cases, none of which offer any guidance here. In *Dove v. State*, 912 So. 2d 1091, 1093-94 (¶¶ 10-11) (Miss. Ct. App. 2005), the Court considered whether Dove’s prior convictions should have been allowed into evidence. Dove argued that the evidence unfairly prejudiced the jury. *Id.* This Court determined that the supreme court had “rejected this claim and noted that the evidence of the defendant's prior DUI convictions was necessary to meet the State's burden of proof and obtain conviction for a felony DUI. *Id.* at 1094 (¶11) (citing *Weaver v. State*, 713 So. 2d 860, 865 (¶31) (Miss. 1997)). Thus, it was proper for the trial court to allow proof of prior convictions. *Dove*, 912 So. 2d at 1094 (¶11) This Court’s analysis continued, “[l]ikewise, in the present case, it was necessary for the State to produce evidence of Dove's prior DUI convictions in order to secure a felony DUI conviction, *because the prior arrests were elements of the crime with which he was charged.*” *Id.* (emphasis added). Thus, *Dove* is consistent with the majority’s ruling here that both the arrest and the conviction are elements of the crime of DUI third offense.

¶13. In *Atwell v. State*, 848 So. 2d 190, 191 (¶2) (Miss. Ct. App. 2003), this Court considered a petition for post conviction relief where Atwell pled guilty to felony driving under the influence. This Court looked at the information available and determined that Atwells’ convictions for driving while intoxicated in the State of Georgia were sufficient under Miss. Code Ann. § 63-11-30(2)(c) (Rev. 1996). *Id.* at 192 (¶7). The issue before us here is not the same as in *Atwell*. This Court’s decision in *Atwell* did not delete an element of the crime, i.e. the “offenses being committed within a period of five (5) years.” Miss. Code Ann. § 63-11-30(2)(c) (Rev. 2004).

¶14. In *Arnold v. State*, 809 So. 2d 753, 757 (Miss. Ct. App. 2002), Arnold argued that there was no evidence of the first or second offenses. This Court, without providing all of the details, decided the evidence was sufficient and held:

Our statute on DUI/third offense reads as follows:

*For any third or subsequent conviction of any person violating subsection (1) of this section, the offenses being committed within a period of five (5) years, such person shall be guilty of a felony and fined not less than Two Thousand Dollars (\$ 2,000.00) nor more than Five Thousand Dollars (\$ 5,000.00) and shall be imprisoned not less than one (1) year nor more than five (5) years in the State Penitentiary.*

Miss. Code Ann. § 63-11-30(2)(c) (Rev. 1996) (emphasis added). We read the statute to say that any third conviction of the crime of driving under the influence under Miss. Code Ann. § 63-11-30(1) (Rev. 1996), may be sentenced as a felony charge. There is nothing in the statute that we interpret to mandate that the convictions be labeled, literally, as a “first offense,” followed by a “second offense,” followed by a “third offense.” Because the statutory language provides that there must be three convictions within five years, without any further stipulations, we hold that Arnold was subject to be sentenced under this section governing third offense DUIs, despite his arguments otherwise. Miss. Code Ann. § 63-11-30(2)(c) (Rev. 1996).

*Arnold*, 809 So. 2d at 757 (¶7) (Miss. Ct. App. 2002) (emphasis in original). The Court concluded that “[a]lthough there is minimal information in the record as to Arnold's two prior DUI convictions, there is nothing in the record to suggest that any statutory mandates were not followed in this case.” *Id.* at (¶13). Just as in *Atwell*, *Arnold* did not delete the statutory requirement that the offenses were committed within five years; instead, it merely held that there was sufficient evidence as required by the statute.

¶15. We illustrate the problem. The offense before us occurred on November 27, 2004, the date Smith was stopped and *arrested*. Under the statute, the State must establish that Smith was convicted of two prior DUI's that were committed within five years. Thus, Smith had to have committed two prior DUI's within the five year period from November 27, 1999 through November

27, 2004. The State offered a judgment that established that Smith was arrested on February 2, 2000, and convicted of the offense of driving under the influence on March 10, 2000. The first offense was established. For the second offense, the State offered a judgment that established that Smith was convicted of the offense of driving under the influence on September 3, 2002. The judgment does not establish the date of the arrest. If this offense was committed on or before November 26, 1999, it could not establish the second offense. The problem is that the State did not establish that the three DUI's were committed within five years. We could assume that the September 3, 2002 conviction was committed within the five year period. However, we decline to assume facts not in evidence, and we will require the State to prove all of the elements of the crime.

¶16. Even giving the State the benefit of all inferences that may be drawn from the evidence, there was no evidence introduced to establish that the offense occurred within five years of the charged offense. Therefore, the evidence is insufficient to support the finding of Smith guilty of DUI third or subsequent offense.

*II. The State denied Smith a fair trial by introducing evidence of prior DUI convictions during the guilt phase of the trial.*

¶17. Smith's second allegation of error is that he was denied a fair trial since evidence was introduced of prior bad acts. Specifically, he claims it was prejudicial to introduce evidence of the prior DUI convictions during the guilt phase of the trial. Smith relies upon *Strickland v. State*, 784 So. 2d 957, 962 (¶20) (Miss. 2001), which stated that the "prior convictions are only relevant as to sentencing and should only be admitted during a separate sentencing phase." The supreme court has since clarified that each prior conviction is an element of a charge for the crime of DUI third offense. *Rigby v. State*, 826 So. 2d 694, 699 (¶6) (Miss. 2002). Since the earlier convictions are elements of the charge of DUI third offense, if we prevented the State from proving the prior convictions to the jury then we "would preclude the State from proving an essential element of the crime and the circuit

court would breach its duty to instruct the jury on all the essential elements of the crime charged.” *Ward v. State*, 881 So. 2d 316, 320 (¶18) (Miss. Ct. App. 2004) (citing *Rigby*, 826 So. 2d at 701 (¶13)). Since the State is required to prove all the essential elements of the crime charged, it was not unfair prejudice to present evidence of prior DUI convictions. Therefore, this issue is without merit.

### CONCLUSION

¶18. While we find that there was insufficient evidence to prove Smith’s violation of DUI third offense, it is undisputed that Smith was in violation of Section 63-11-30(1) whereby he operated a motor vehicle with a blood alcohol concentration greater than .08%. Smith correctly alleges that the State failed to prove that Smith had two prior DUI convictions, where the offenses occurred within five years. Without evidence of when the offense for the September 3, 2002, conviction occurred, there is insufficient evidence to convict Smith of felony DUI. Accordingly, we remand this case to the Circuit Court of Leake County with direction to sentence Smith for violation of Section 63-11-30(2)(b) and not Section 63-11-30(2)(c).

**¶19. THE JUDGMENT OF THE CIRCUIT COURT OF LEAKE COUNTY IS REVERSED AND REMANDED TO SENTENCE MICHAEL MEAN SMITH ACCORDING TO MISSISSIPPI CODE ANNOTATED SECTION 63-11-30(2)(b). ALL COSTS OF THIS APPEAL ARE ASSESSED TO LEAKE COUNTY.**

**KING, C.J., LEE, P.J., IRVING, CHANDLER, BARNES, ISHEE AND ROBERTS, JJ., CONCUR. MYERS, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY CARLTON, J.**

### **MYERS, P.J., DISSENTING:**

¶20. I respectfully disagree with the majority opinion and would affirm Smith’s conviction of felony DUI, third offense. The majority interprets a portion of our DUI statute, Mississippi Code Annotated section 63-11-30(2)(c) (Rev. 2004), to require that two previous DUI *arrests*, rather than convictions, are required to have occurred within a five year period of the third DUI arrest to subject



the defendant to the charge of felony DUI. I would interpret our implied-consent law to require that a defendant have two prior DUI *convictions* occur within five years of the charge of the third DUI, rather than require that the dates of arrests occur within a five year period of the third DUI charge, in order to subject a defendant to the elevated felony DUI charge. My opinion is based upon review of the applicable statute, as well as numerous opinions of the Mississippi Supreme Court and this Court that address the necessary elements required to prove felony DUI.

¶21. The language of the statute that the majority relies upon in formulating its opinion reads in pertinent part, “for any third or subsequent conviction of any person violating subsection (1) of this section, *the offenses being committed within a period of five (5) years*, such person shall be guilty of a felony.” Miss. Code Ann. § 63-11-30(2)(c) (emphasis added). While we note that, at first glance, the term “offenses” appears to indicate the dates of the actual previous DUI arrests, further construction of the statute makes clear that the term “offenses” in this subsection is used to modify the term “conviction.” The statute references the phrase “offenses being committed,” but legally there is no judicial statement of a defendant having “committed” the offense until there is a conviction. Thus, it is clear that an element of the charge of felony DUI requires two previous convictions, rather than just arrests, be shown to prove felony DUI. Furthermore, a review of Mississippi Code Annotated section 63-11-30(8) instructs the application of our implied-consent law for the purposes of sentencing a felony DUI. The subsection reads in pertinent part,

For the purposes of determining how to impose the sentence for a second, third or subsequent conviction under this section, the indictment shall not be required to enumerate previous convictions. It shall only be necessary that the indictment state the number of times that the defendant has been *convicted and sentenced within the past five (5) years* under this section to determine if an enhanced penalty shall be imposed.

Miss. Code Ann. § 63-11-30(8) (emphasis added). There is no mention in this subsection of the necessity of proving a requisite number of previous *arrests* for DUI. The language is clear within

this portion of the statute that the previous DUI convictions and sentences are required to be included in the indictment as a necessary element of felony DUI, third offense.

¶22. Furthermore, while our courts have never directly addressed the issue of this case precisely, case law discussion in other contexts regarding our implied-consent law has consistently stated that prior *convictions* are the measuring elements in determining whether one may be properly charged with felony DUI. See *Ostrander v. State*, 803 So. 2d 1172, 1175 (¶¶8-9) (Miss. 2002) (discussing the holdings of three felony DUI cases, stating that “a prior *conviction* is a necessary element of the underlying charge” and holding that “a prior DUI *conviction* is a necessary element of a DUI second offense”) (emphases added); *Rigby v. State*, 826 So. 2d 694, 702 (¶6) (Miss. 2002) (stating that “[p]rior DUI *convictions* are elements of a felony DUI charge and are required to be submitted to a jury”) (emphasis added); *Williams v. State*, 708 So. 2d 1358, 1362 (Miss. 1998) (addressing an argument regarding an indictment, stating “the underlying prior *convictions* that raised his third offense DUI to a felony charge” (emphasis added); *Weaver v. State*, 713 So. 2d 860, 865 (Miss. 1997) (holding that “the State had the burden of proving the [defendant’s] two prior *convictions* in order to obtain the Felony DUI conviction” (emphasis added); *McIlwain v. State*, 700 So. 2d 586, 589 (Miss. 1997) (quoting *Benson v. State*, 551 So. 2d 188, 196 (Miss. 1989)) (discussing the requirements of an indictment charging felony DUI, stating “the indictment must still ‘supply enough information to the defendant to identify with certainty the prior *convictions* relied upon by the State for enhanced punishment’”) (emphasis added); *Dove v. State*, 912 So. 2d 1091, 1093 (¶11) (Miss. Ct. App. 2005) (finding it necessary for the State to produce evidence of the defendant’s prior DUI *convictions* in order to secure a felony DUI conviction); *Ward v. State*, 881 So. 2d 316, 320 (¶18) (Miss. Ct. App. 2004) (stating “prior DUI *convictions* are necessary elements of felony DUI”) (emphasis added); *Atwell v. State*, 848 So. 2d 190, 192 (¶7) (Miss. Ct. App. 2003) (interpreting Miss.

Code Ann. § 63-11-30(2)(c), stating “[i]t is not required that the predicate *convictions* be felonies, only that they be *convictions* for driving under the influence within the past five years”) (emphasis added).

¶23. This Court has made it clear that prior convictions are a necessary element which must be proven in order to obtain a conviction on a felony DUI in *Smith v. State*, 736 So. 2d 381 (Miss. Ct. App. 1999) and in *Watkins v. State*, 910 So. 2d 591 (Miss. Ct. App. 2005). In *Smith*, we differentiated the crimes of first offense, second offense, and third offense felony DUI by stating “[t]he crime of felony DUI requires a third or subsequent charge of DUI together with two previous DUI *convictions* within a period of five years. *Id.* at (¶6) (citing Miss. Code Ann. § 63-11-30(2)(c) (Rev. 1996)) (emphasis added). We later explained in *Watkins* the sentencing procedure for conviction of a third DUI, stating “the question of the number of prior *convictions* under Miss. Code Ann. § 63-11-30 generally precedes the question of sentencing and determines the range of sentences available to be imposed.” *Watkins*, 910 So. 2d at (¶11) (emphasis added) “[T]he number of prior *convictions* determines which subsection of Miss. Code Ann. § 63-11-30 applies.” *Id.* (emphasis added).

¶24. Moreover, the DUI statute has been interpreted by this Court in *Arnold v. State*, where we found that “the statutory language provides that there must be three *convictions* within five years.” 809 So. 2d 753, 757 (¶11) (Miss. Ct. App. 2002) (emphasis added). In this case, “[w]e read the statute to say that any third *conviction* of the crime of driving under the influence under Miss. Code Ann. § 63-11-30(1) (Rev. 1996), may be sentenced as a felony charge.” *Id.* (emphasis added). We stated “[t]here is nothing in the statute that we interpret to mandate that the *convictions* be labeled, literally, as a ‘first offense,’ followed by a ‘second offense,’ followed by a ‘third offense.’” *Id.* (emphasis added). We went on further to discuss our decision in *McIlwain v. State*, 700 So. 2d 586,

589 (Miss. 1997), stating “the court ruled that ‘it is only necessary that the defendant have been *convicted* of [the] previous offenses . . . it is irrelevant whether McIlwain had been charged with a D.U.I. First and a D.U.I. Second.’” *Id.* (emphasis added).

¶25. In light of the language of Mississippi Code Annotated section 63-11-30(8), as well as the overwhelmingly vast amount of related case law we have before us interpreting our DUI statute to require previous convictions as a predicate to a charge of felony DUI, I must dissent from the majority opinion. The implied-consent statute, as it pertains to a charge of felony DUI, creates a prerequisite that the two prior DUI convictions, occurring either through a finding of guilt or the entry of a guilty plea, precede the commission of the principal offense within five years in order to enhance the charge to felony status under the DUI statute. Smith was twice convicted of DUI, in March of 2000 and September of 2002, before he was charged with a third violation of the DUI statute in November of 2004. The dates of his two previous DUI convictions fell within five years of the third DUI charge. He, therefore, was subject to conviction of third offense felony DUI. Mississippi Code Annotated section 63-11-30 necessarily contemplates that a defendant must be found guilty or must plead guilty on two occasions prior to the commission of a third DUI before the State may bring a charge for felony DUI. To hold otherwise, I think, is contrary to the language of the statute, as well as contrary to the findings of a vast number of cases of the Mississippi Supreme Court and this Court.

**CARLTON, J., JOINS THIS OPINION.**